IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 3850 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? **1 & 2 YES; 3 to 5 NO**

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G.V.CHAUDHARI & 5 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR PM THAKKAR for Applicant(s) : 1 - 6.
MR SS PATEL ADDL PUBLIC PROSECUTOR for Respondent(s) : 1,
MR VIJAY H PATEL for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 05/03/2007

CAV JUDGMENT:

1. Petitioners, police personnel, have moved this court on 10.8.1993 under section 482 of the Code of Criminal Procedure, 1973 (for short "the Code") for quashing the complaint registered against them in the court of learned Judicial Magistrate, First Class, Surendranagar as Criminal Case No.2 of 1986; and, after admission and grant of interim relief on 12.8.1993 staying proceedings of the trial court, the petition appears to have been, for the first time, listed straightaway in February, 2006 for hearing and has come to be disposed now. The original complaint alleging offences punishable under sections 302, 307, 34, 147, 148, 149, 120-B and 427 of the Indian Penal Code, 1860 (for short "the IPC") was made on 17.1.1986 for the alleged incident of killing the son of the complainant on 12.8.1985.

1.1 During the intervening period of 22 years, the original complainant and one of the main accused persons, namely, police sub-inspector Mr.M.J.Jhala, is stated to have passed away and the remaining accused persons are stated to have retired and reached ripe old age. The issue for the first time raised in the petition after seven years of the complaint is as to

whether sanction under the provisions of section 197 of the Code was required before proceeding with the complaint. And, present petition for decision on that issue has remained pending for all these 13 years without being ever argued on merits and without being even listed for that purpose, even as thousands and thousands of other cases have passed through the portals of this Court. There is no, and there cannot be any, satisfactory explanation for this phenomenon. It may be of a piece with these facts that the original complainant was for the first time joined as a party before this court only when the matter was taken up for hearing in November, 2006 when he was already dead 17 years ago. Who, from amongst the players in performing such a feat, would stand up and take the responsibility? The question as to what remedial, punitive and reformative actions should be taken may arise afterwards.

2. According to the petitioners, the complaint against them was registered for the death of the complainant's son and learned Judicial Magistrate, First Class, had taken cognizance and issued warrants against the petitioners who were serving in police department. Therefore, the petitioners approached this court by filing Misc. Criminal Application

No.3296 of 1993 for anticipatory bail and this court granted anticipatory bail on 20.7.1993. According to the petition, deceased Gora Bhavan and other persons were pelting stones and wielding deadly weapons on 12.8.1985 during the agitation in connection with roaster system. Two FIRs No.191 and 192 of 1985 were registered against the deceased and many other persons on the information received at 4.p.m. and 7.p.m. on 12.8.1985. It is averred that the mob was beyond control, the petitioners had warned the deceased and other accused persons and had fired in air as well as resorted to lathi charge. However, since the mob was beyond the control, the petitioners were constrained to resort to firing whereby the complainant's son had died. Thus, the petitioners had acted in discharge of their duties and the deceased had criminal antecedents, according to the averments. Pursuant to the incident of firing, a Commission was appointed and a report was submitted to the District Superintendent of Police, concluding that the mob had turned unruly and hence, in discharge of their duties, the petitioners were constrained to fire at the mob. The petitioners have relied upon the messages sent on the next day by the District Superintendent of Police to the Home Secretary.

2.1 It must be noted at this stage that not only that the complainant was not joined as a party, but the aforesaid averments about annexing the report of the Commission to the District Superintendent of Police were contrary to the facts insofar as the so-called report at Annexure-D to the petition is, in fact, a report of the District Superintendent of Police and report of the Commission is never placed on record.

3. Even more striking about the petition is the fact that the whole proceedings of the inquiry that was ordered and that took place from 17.1.1986 to 09.7.1993 in the trial court under the provisions of Section 202 of the Code finds no mention in the whole petition, even as the first prayer is to call for the record and proceedings of the said criminal case. Another striking feature is that, though the State Government was the sole respondent and proceedings of the criminal case alleging murder was stayed by practically an ex-parte order of interim relief, the State had neither filed any affidavit to confirm or rebut any of the averments, nor done anything to expedite hearing of the matter. Ultimately, during the course of hearing, this court called for the record and proceedings, permitted joining of the original

complainant as respondent and requested learned advocate Mr.V.H.Patel to assist the court on behalf of the heir of the complainant and asked the State Government to make its stand clear. Pursuant to that, an affidavit of Under Secretary, Home Department (Law and Order), State of Gujarat, was filed to state, in substance, that in the private complaint filed in the court of learned Judicial Magistrate, First Class, Surendranagar, the Home Department and the Police authorities had not come into the picture at any point of time and, therefore, there was no question of considering the matter for granting or not granting sanction; and no application, either from the complainant or any other authority or person, for grant of sanction was as yet received.

3.1 The other respondent, as heir and representative of the original complainant and the deceased victim, has also filed an affidavit to recapitulate the statements recorded before learned Judicial Magistrate during the inquiry under section 202 of the Code and to highlight how, *prima facie*, the case of serious offences outside the scope of duty was made out and false case of firing or attack by the mob was sought to be made out to evade proper investigation and trial. It may also be pertinent to note here the

categorical statement made at the Bar by the learned A.P.P. that both the cases against the deceased and other persons in the mob, alleging attack on police with deadly weapons, for which the aforesaid FIRs No.191 of 1985 and 192 of 1985 were registered and the prosecution based thereon in Criminal Cases No.20 of 1986 and 61 of 1986 were launched, were withdrawn by the Public Prosecutor under section 321 of the Code on 27.8.1987 and 19.11.1988 respectively.

4. Looking at the version of the original complainant, it was seen from the complaint, supported by statement on oath of the complainant, recorded by learned Judicial Magistrate, that the deceased was President of Dalit Raksha Samiti and a young activist. On 30.4.1983 (27 months before his death), when he had gone to file a complaint against a police constable for beating a Harijan talati and his wife, petitioner No.1 had refused to take the complaint and he had had to approach higher authorities. The deceased had participated at that time in the agitation against petitioner No.1 and he was receiving threats from him on that account. Thereafter, petitioner No.1 had improperly investigated the complaint of another Harijan worker against the President of Surendranagar Municipality and submitted

investigation report which was not accepted by the court, which had annoyed petitioner No.1. During the anti-reservation agitation, the deceased had participated in the agitation organized against anti-reservation movement.

4.1 On 17.5.1985, petitioner No.1 had falsely implicated the deceased and several other Harijan boys in the incident of setting two shops on fire and, after beating them in the police station, the then Deputy Superintendent of Police had threatened to kill him in firing. Therefore, leaders of their community had met the Home Secretary and the Chief Minister on 23.5.2005 and made written representation against petitioner No.1 and sought his transfer in view of threat to life of the deceased. Such representations were continued thereafter. On 27.5.1985, seven notorious persons had killed a Harijan in the square known as Ambedkar Chowk, to which the deceased was an eye witness. One of the accused persons in that case was the son of a policeman and another accused person was not being caught by the police. A representation in that regard was made to the Home Minister on 3.6.1985 and the deceased had signed that representation. Other representations to take action against the petitioners were made on 11.6.1985 and 15.6.1985, pursuant to which, the

deceased was being threatened and conspiracies were being hatched to eliminate him, according to the allegations.

4.2 On the day of the incident, i.e. 12.8.1985, a rally of anti-reservation activists was unusually allowed to pass through Ambedkar Chowk and the area mostly habitated by Harijans and provocative slogans were shouted while shops and kiosks of Harijans were damaged and a Harijan was injured in police firing. However, the situation was calm and under control immediately thereafter and a delegation of leaders of Harijans went to the Collector and the District Superintendent of Police with a request to visit the local area. They, in fact, visited the area known as "Harijanvaas" and found the situation to be normal. After the previous incident of firing at 2.p.m. and till 5.30 p.m., there was no incident endangering law and order in the area. And yet, petitioners No.1 and 2 suddenly came there with arms and other policemen and, without any provocation and with a view to take revenge against the deceased and one Daya Amarsi, started firing. The deceased shouted to instruct everyone to go inside their houses and when he was rushing to go inside his own house, petitioner No.1 repeatedly fired at him. Thus, about 100 rounds of bullets were fired in which

the deceased died and four other persons were injured, according to the complaint.

4.3 After the death and obsequies of the deceased, the complainant went to the police station, but the police refused to take his complaint. Therefore, he, alongwith other leaders, went to the District Collector and the District Superintendent of Police, but his complaint was not taken. Thereafter, Harijan workers went in large numbers to meet the Chief Minister on 14.8.1985 and they were assured that Inspector General of Police will visit the place and take necessary action. Thereafter, on 15.8.1985, District Superintendent of Police accepted the complaint, but no action to register the offences was taken. Police officers went through the motions of undertaking some investigation and collecting some evidence, but nothing more happened on that basis. Thereafter, a Commission was appointed on 30.8.1985, but again no action ensued, according to the complaint. Ultimately, the complaint naming more than 20 witnesses alongwith relevant documents was lodged and registered in the court.

5. Going through the record and proceedings of Inquiry Case No.2 of 1986, which subsequently came to be registered as Criminal Case No.1167 of

1993 after seven years of inquiry under section 202 of the Code, it was seen that the statement of the original complainant was recorded on 17.1.1986 and an order below that was made on the same day in the following terms:

"ORDER

It is ordered that the court shall hold an inquiry in accordance with section 202 of the Cr.P.C. for the offences described in the complaint while postponing the proceedings/order against the accused persons. The complainant and his witnesses shall remain present on 10.2.1986 for inquiry."

A number of documents were filed and the complainant was again examined on oath on 03.4.1986. The complainant produced contemporaneous record and the representations made to several authorities. In all, seven witnesses, including the doctor who treated the deceased, were examined and several relevant documents were produced and accepted in evidence. Remarkably, summons were issued to some of the petitioners themselves and, in reply to the notices issued for production of relevant police record, it was submitted in writing that the record being very important and confidential, it could not be produced in the court.

6. With the above backdrop of facts, the first argument of the learned counsel for the petitioners that the court had taken cognizance and issued non-bailable warrants against the petitioners without application of mind, could not survive. He, however, submitted that bare reading of the complaint clearly indicated that the alleged offences were committed while the petitioners were on duty and the very act of taking cognizance, while ordering an inquiry under section 202 of the Code, was illegal and without jurisdiction. He relied upon the judgment of the Supreme Court in ***Devarapalli Lakshminarayana Reddy v. V.Narayana Reddy [AIR 1976 SC 1672]*** wherein it is observed that, whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted and the nature of preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of section 190(1)(a).

6.1 Relying upon recent judgment of the Supreme Court in ***Sankaran Moitra v. Sadhna Das [2006 (3) GLR 2304]***, it was submitted that the Supreme Court had, in similar circumstances, quashed complaint only on the ground of want of sanction under section 197 (1) of the Code on the basis that a prosecution hit by that provision cannot be launched without the sanction. It was noticed that, in that case, some facts were disclosed in the counter-affidavit filed on behalf of the State which showed that there was, at the polling booth, some disturbance which had taken a violent turn and clashes between supporters of two political parties were very imminent when the officers concerned reached the site of the incident in an official vehicle. The version of the public officers was supported by the witnesses examined by the Chief Judicial Magistrate while taking cognizance of the offence. It, on the basis of such material, emerged that the alleged act was done while the officers were performing their duty. The Supreme Court heavily relied, in following words, upon the fact that investigation into the two cases registered for the offences punishable under sections 148, 149 and 336 of the IPC read with sections 3 and 5 of the Explosive Substances Act was not completed:

> *"8. ....What is relevant for our purpose is to notice that investigations into the two crimes registered, namely, Case No.111 under sections 148, 149, 336 IPC read with sections 3 and 5 of the Explosive Substances Act and Case No.112 registered on the complaint made by the complainant herein on 11.5.2001, have not been completed."*

In the above facts, when the learned counsel for the original complainant submitted that the whole investigation and the whole process was being delayed in view of the fact that the accused involved were police personnel and the State was interested in protecting them than in having justice done, the Supreme Court observed:

> *"11. ....When we take note of this submission, postponing a decision on the applicability or otherwise of section 197 (1) of the Code can only lead to the proceedings being dragged on in the trial court and a decision by this court, here and now, would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind."*

Ultimately, the Supreme Court held as under:

> *"25. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in performance of duty. If it was done in performance of duty or purported*

performance of duty, section 197 (1) of the Code cannot be by-passed by reasoning that killing a man could never be done in an official capacity, and consequently, section 197 (1) of the Code could not be attracted....."

7. Learned counsel for the petitioners relied upon the Constitution Bench judgment of the Supreme Court in ***Matajog Dobey v. H.C.Bhari [AIR 1956 SC 44]*** and pointed out the following observations in para 20 thereof:

> *"20. ....The other learned Judge also states at p.55, "At this stage we have only to see whether the case alleged against the appellant or 'sought to be proved' against him relates to acts done or purporting to be done by him in the execution of his duty."*
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> *It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial may establish the necessity for sanction.*
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> *Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."*

8. Learned counsel Mr.V.H.Patel, who was requested to assist the court, and learned A.P.P. submitted that no question or issue of sanction

had arisen before the trial court even at the end of inquiry by the court and it was only by way of gross abuse of the process of court that the present petition under section 482 of the Code was filed in this court to agitate the issue of sanction for the first time straightaway in the higher forum and, after the injunction initially granted against further proceedings, adjudication of that issue was inexplicably delayed. The learned counsel relied upon the following observations of the Supreme Court in ***Bakhshish Singh Brar v. Smt. Gurmej Kaur [AIR 1988 SC 257]***:

> *"6. In the instant case, it is alleged that grievous injuries were inflicted upon the complainant and as a result of injuries one of the alleged accused had died. The question is while investigating and performing his duties as a police officer was it necessary for the petitioner to conduct himself in such a manner which would result in such consequences. It is necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution, that is the rationale behind S.196 and S.197 Cr.P.C. But it is equally important to emphasis that rights of the citizens should be protected and no excesses should be permitted. "Encounter death" has become too common. In the facts and circumstances of each case, protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is*

true that section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties, then the trial may have to be stayed unless sanction is obtained. But at the same time, it has to be emphasized that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."

9. The issue of sanction has become a vexed one and appears to provide the material for weaving a web of litigations even before or during the trial involving public servants. This court had an occasion to deal with the issue in similar circumstances of the trial being delayed by quarter of a century in ***S.S.Khandwawala (IPS), Additional Director General of Police and Others v. State of Gujarat and Another [2003 (1) GLR 802]***; and it was held as under:

"*7. The guiding principles that emerge from the survey of the legal dicta with regard to applicability of the provisions of section 197 Cr.P.C. can be summarized as under:*

(a) All the material brought on record for the prosecution as also other material placed or brought on record for the purpose may be considered by the Court in forming the opinion as to whether the provisions of section 197 of the Cr.P.C. were applicable in the facts of the case;

(b) The facts coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for

sanction. Whether sanction is necessary or not may have to be determined from stage to stage;

(c) While it cannot be a part of official duty to commit an offence, every act constituting an offence committed in the course of duty cannot enjoy the protection of section 197 of the Cr.P.C. The right approach lies between the two extremes. An act constituting an offence will require sanction if it is directly and reasonably connected with the official duty of the accused;

(d) It is the "act" and the quality of the act that is important and if it falls within the scope and range of his official duties, the protection contemplated by section 197 will be attracted;

(e) There must be a reasonable connection between the act and the discharge of official duty; the alleged act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty, or in purported discharge of his duty; and

(f) In case of a gross violation of fundamental right to life, it can hardly be claimed that the alleged act amounting to an offence was committed while acting or purporting to act in the discharge of official duty."

The last proposition in point (f) was derived from the discussion as under:

"5. With the development and assimilation of human rights jurisprudence, it is now well-

settled that any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution; whether it occurs during investigation, interrogation or otherwise. As observed in D.K.BASU (supra), if the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. .....It is also observed that not only prosecution of the offender is an obligation of the State in case of every crime but the victim of the crime needs to be compensated monetarily also. To repair the wrong done and give judicial redress for legal injury as a compulsion of judicial conscience, an obligation to pay damages is cast upon the State for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. .....State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the Rule of Law. It is also observed that the duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

5.1 In KARTAR SINGH (supra), the Constitution Bench of the Supreme Court, while dealing with the validity of the TADA Act. 1987 observed that it is not the hierarchy of the police officer but the suspicion in mind of the common man about adherence to procedural safeguards which are relevant, for, appearance of injustice is denial of justice. Moreover, even if the offenders and the offences under that Act constitute a separate class, the harsher procedure prescribed for dealing with them must satisfy the test of Article 21. Since

deprivation of right of any person by the State is prohibited except in accordance with the procedure established by law, it is to be construed strictly against the State and in favour of the person whose rights are affected. Article 21 is a constitutional command to State to preserve the basic human rights of every person. Existence of right and its preservation has, thus, to be construed liberally and expansively. As a corollary to it the exercise of power by the State has to be construed narrowly and restrictively. It should be so understood and interpreted as not to nullify the basic purpose of the guarantee. .....Per majority, it is observed that in case of police brutality and atrocities committed in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantee and human decency, the Supreme Court is committed to uphold human rights even as a part of long standing heritage and as enshrined in our constitutional law. This perspective needs to be kept in view by every law enforcing authority because the recognition of the inherent dignity and of the equal and inalienable rights of the citizens is the foundation of freedom, justice and peace in the world. If the human rights are outraged, then the court should set its face against such violation of human rights by exercising its majestic judicial authority. It is also observed by His Lordship K.Ramaswamy, J. that the procedure which smacks of the denial of fundamental fairness and shocks the conscience or universal sense of justice is an anathema to just, fair or reasonable procedure. Articles 14 and 21 frown against arbitrary and oppressive procedure.

5.2 Against the backdrop of the legal dicta briefly discussed hereinabove, the issues thrown up in the context of this case are, whether the alleged acts of

violence which violate the basic human rights can be claimed to have been committed while acting or purporting to act in the discharge of official duty ?; and, whether it would be a fair procedure that the State, which may be vicariously responsible for the tortuous acts amounting to several offences, if proved, should be construed to have the authority to grant or refuse to grant sanction for the prosecution of its instrumental officers ?"

9.1 The following observations of the Supreme Court in ***State of H.P. v. M.P.Gupta [(2004) 2 SCC 349, K.Kalimuthu v. State by DSP [(2005) 4 SCC 512*** and ***Rakesh Kumar Mishra v. State of Bihar [(2006) 1 SCC 557]*** are also relevant:

"7. .....This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. .....The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. <u>It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it.</u> .....There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if

the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of section 197 does not get immediately attracted on institution of the complaint case. .....The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. .....The section does not extent its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty. .....The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty, then it must be given liberal and wide construction so far its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that extent, the section has to be construed narrowly and in a restricted manner. But once it is established that the act or omission was done by the public servant while discharging his duty, then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise, the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force which may be an offence for the

> *prosecution of which sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty and without any justification therefor, then the bar under section 197 of the Code is not attracted. .....If, on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, then it must be held to be official to which applicability of section 197 of the Code cannot be disputed."*
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> (underlines added)

10. The factual matrix and the peculiar backdrop of the proceedings in the present case are materially different from the facts in ***Shankaran Moitra*** (supra) insofar as the criminal cases launched against the alleged violence by the mob have been unilaterally withdrawn by the State; and the allegations against the police personnel are, *prima facie*, found by the court of law to be sufficient to initiate trial of serious offences. The case against the police personnel, if proved, would be much more serious than other offences under the same sections since they would have been committed by the guardians of law and would be violation of human rights of citizen by the officers whose duty it was to protect them. It is well-settled that State may be vicariously responsible for violation of human rights by its officers in such cases. The fact that State, as the prosecuting agency, has remained a mute

spectator and has not come forward with even the report of the Inquiry Commission appointed by it and not co-operated with the inquiry held in the court, has to be held against it and the petitioners. The acquiescence of the State as the sole respondent in pendency of the present proceedings before this court for all these 13 years, without the court being ever moved for at least hearing of the matter on merits and the reply that application for sanction would be considered as and when it comes, does not improve the case of the petitioner but indicates the assumption that sanction may, at some stage, be found to be required.

11. Obviously, the petitioners have preferred to put forward their case directly and for the first time before this court without raising any plea or objection in the trial court where factual contentions could be established, argued and examined. At this stage, there are two contradictory versions in two different fora and this court is called upon to decide the issue of requirement of sanction which necessarily involves decision on issues of fact. The evidence and material on record of the trial court which has taken cognizance and initiated the trial admittedly did not have anything that would indicate the requirement of sanction insofar as

the armed attack on the victims by the petitioners was alleged to be wholly unnecessary, unprovoked and a part of conspiracy to kill the deceased. Whereas the version canvassed by the petitioners before this court is neither supported by any worthwhile evidence nor could it be put to any test by the prosecution. As held, after an elaborate discussion, by the Patna High Court in ***Behari Rai v. The State [AIR 1952 Patna 253]***, in deciding whether section 197 has any application, the test is the prosecution story and not the defence of the accused. That was also authoritatively laid down by the Federal Court in the case of ***Hori Ram Singh v. Emperor [AIR (26) 1939 FC 43]***. And, as held by Karnataka High Court in ***M. Madiah v. State of Karnataka [1978 Cr.L.J. 734],*** the word 'while' used in section 197 must be read with the words that follow and is not to be construed strictly in its meaning of time. Therefore, even if it were made to appear by any cogent and relevant material that the accused person was on duty at the time of commission of the alleged offence, it would by itself not be sufficient to assume that the embargo under section 197 of the Code was invoked. It is also held in a number of judgments of the Supreme Court referred hereinabove in para 9.1, that it is not the duty which requires examination so much as the act. Taking the facts revealed before

the trial court, taking the prosecution story at its face value and in absence of any worthwhile and reliable material before this court to believe that the petitioners had committed the alleged acts of violence while acting or even purporting to act in the discharge of their official duty, it would be improper, unjust and illegal to stifle the prosecution by quashing the complaint itself as prayed by the petitioners. It may be recalled and reiterated that, for an act to come within the ambit of duty or purported discharge of official duty, the alleged act must bear such relation to the official duty that the accused can lay a reasonable, but not a pretended or fanciful claim, that he did it in the purported discharge of duty. And, an act which allegedly amounts to murder can hardly be even remotely claimed to be committed in purported discharge of duty.

12. It is also settled by several judgments of the Supreme Court including the Constitution Bench judgment in ***Matajog Dobay*** (supra) that the complaint may not disclose that the alleged offence was committed while acting in discharge of duty but facts subsequently coming to light during inquiry or trial may establish the necessity of sanction. And, as held in ***Bakshish Singh Brar*** (supra), if, even after cognizance

having been taken, facts come to light that the alleged acts were done in discharge of official duty, then the trial may have to be stayed unless sanction is obtained. But criminal trial should not be stayed in all cases at the preliminary stage because that would cause great damage to the evidence. Therefore, in short, this is not a fit case for this court to exercise its inherent powers to quash the complaint or the criminal proceedings at this stage.

13. The above relevant legal propositions settled by the Supreme Court could and ought to have been canvassed at the earliest before this court; but by ingenuous drafting of the petition, suppression of material facts, non-jointer of the complainant and inexplicable and mysterious assignment of the matter to a presumably reserved corner of the office of this court and obvious disinterest of the office of the public prosecutor, the apprehension of damage to important evidence and death of the complainant and one of the main accused persons, have in fact materialized. Whether truth, law and justice would prevail in the present case, even as sanction is found to have not been required at this stage and could be found to have been required later on and immediately granted and the offences were proved, conviction recorded and

confirmed in the higher court ? The failure of the justice delivery system is writ large and stares into the face. The course of proceedings, more than the facts of the case, prove that the State as the prosecuting agency could be worse to ineffective in the cases involving police personnel and violation of human rights. In this context, the language and sweep of the provisions of section 197 of the Code obviously requires a legislative re-look and amendment, particularly to indicate the forum, the stage at which and the time-limit within which the issue of sanction ought to be resolved. The administration of the High Court which could keep such serious cases, of which the numbers were reported, on enquiry, to be hundreds, away from judicial scrutiny, requires a thorough overhaul and appointment of an ombudsman. It is the virtual absence of self-correcting mechanism that should worry and activate all those having stake in and respect for the rule of law.

14. In the facts and for the reasons discussed hereinabove, the petition is rejected. Rule is discharged and interim relief is vacated. Out of the amount of Rs.10,000/- ordered to be deposited towards cost for respondent No.2, Rs.5,000/- are already paid to him and the remaining amount of Rs.5,000/- is ordered to be

paid to learned advocate Mr.V.H.Patel towards his cost and expenses while rendering able assistance at the request of the court. The trial court shall now proceed with Criminal Case No.2 of 1986 as expeditiously as practicable and conclude the proceedings, as far as practicable, within six months.

15. Copies of this judgment shall be sent to the learned Advocate General, State of Gujarat and submitted to the Law Commission of India and to the Hon'ble the Chief Justice, High Court of Gujarat, for appropriate actions.

Sd/-
(D.H.Waghela, J.)

(KMG Thilake)